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No. 94-1237

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

KEYSTONE CHAPTER, ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN REPRESENTATION OF ITS MEMBERS,
Petitioner,

v.

SECRETARY OF LABOR & INDUSTRY FOR THE COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE BY STEAMFITTERS LOCAL UNION NO. 420, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY, FOR THE RESPONDENT

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Petitioner,

vs.

SECRETARY OF LABOR & INDUSTRY FOR THE COMMONWEALTH OF PENNSYLVANIA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Steamfitters Local Union No. 420, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but not received.

The interest of Steamfitters Local Union No. 420 in this case arises from the fact that its members have a substantial interest in obtaining and retaining employment on public works projects that are covered by the Pennsylvania Prevailing Wage Act, 43 P.S. §§165-1, *et seq.*. A reversal of the decision of the Court below will automatically affect existing collective bargaining agreements to which the Union is a party and the collective bargaining relationship between the Union and all employees performing work on public projects.

Respectfully submitted,

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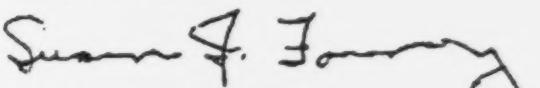
Re: Keystone Chapter ABC v. Secretary of Labor and Industry

Dear Mr. Sigmond:

As we discussed over the telephone, respondent consents to the filing of an amicus brief on behalf of the Steamfitters Local Union No. 420, opposing the petition for a writ of certiorari in this matter.

Very truly yours,



SUSAN J. FORNEY
Senior Deputy Attorney General

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cc Elaine Mead

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*

Steamfitters Local Union No. 420, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry ("Local 420" or "Union") is a labor organization that represents more than 3500 skilled steamfitters, pipefitters and welders in Southeastern Pennsylvania. The Union represents employees who perform steamfitting, pipefitting and welding work on a wide variety of private and public construction projects as well as numerous skilled classifications in the heating, ventilation and air conditioning service industry. Its membership includes apprentices and tradespersons who, through job experience and classroom instruction, have obtained journeymen status. Local 420 is signatory to a number of collective bargaining agreements with employers in the construction industry. The collective bargaining agreements establish wages and other terms and conditions of employment, including contributions to employee benefit funds regulated by ERISA, for work performed in the private sector as well as on public works projects.

Members of Local 420 have substantial interest in obtaining and retaining employment on public works projects that the State and local governments typically award to the lowest responsible bidder.[1] Local 420 members have worked in the past, are presently working, and desire to work in the future on public works construction projects that are covered by the Act. In upholding the Act, the Third Circuit Court of Appeals' decision directly effects the wages of Local 420 members who are currently employed on public works projects. The earnings of Local 420 members on future contracts are similarly affected in a beneficial manner, as the wage and benefit rates in the collective bargaining agreements to which Local 420 is a party closely parallel the rates determined by the Secretary of Labor and Industry for public works projects.

For members of Local 420 and other similarly-situated tradespersons, the decision of the Court of Appeals results in work opportunities and stable wages and fringe benefits on

1. The cost of labor on public works projects is an integral part of the competitive bid submitted by a prospective contractor.

public works projects. Employers who are bound by collective bargaining agreements are placed on a competitive footing in bidding on public contracts vis-a-vis employers who offer fewer or no fringe benefits to their employees. If the Act were to be overturned, employers who offer no benefits will have a decided advantage as public works contracts are typically awarded to the lowest responsible bidder. *United States v. Binghampton Const. Co.*, 347 U.S. 171 (1954).

SUMMARY OF ARGUMENT

The Pennsylvania Prevailing Wage Act ("Act") is a valid exercise of state power in the area of health and welfare and is not preempted by ERISA. In upholding the Act, the Third Circuit decision, *Keystone Chapter, Assoc. Builders and Contractors, Inc. v. Foley,* 37 F.3d 945 (3rd Cir. 1994) (*"Keystone"*), follows Supreme Court precedent and is consistent with other Circuit decisions.

The Act does not relate to any benefit plan covered by ERISA, and, therefore, does not fall under ERISA's preemption standard. The Act directs the Secretary of Labor and Industry to set minimum prevailing wages, including a cash component and a benefit component. The benefit component can be satisfied by contributions to employee benefits or additional cash wages. Therefore, the Act does not place any restrictions or requirements on ERISA benefits, but rather, only demands that certain wages be paid. In sum, the Act can be fulfilled without any reference to ERISA-covered benefit plans and neither directly or indirectly regulates conduct towards ERISA plans.

ERISA's preemption clause was not intended to prevent states from regulating in the area of wages or employee compensation generally. Although state wage regulation, such as the Act, may affect employer decisions regarding ERISA-covered benefit plans, both this Court and lower federal courts have recognized that this type of affect falls well outside the parameters of ERISA preemption. Thus, as a legitimate exercise of state regulation, the Act is not preempted by ERISA and the "Petition for a Writ of Certiorari" should not be granted.

ARGUMENT

I. THE PENNSYLVANIA PREVAILING WAGE ACT IS A VALID EXERCISE OF HEALTH AND SAFETY REGULATION AND IS NOT PREEMPTED BY ERISA.

The purpose of the Act is to "protect workmen from substandard pay by ensuring that they receive the prevailing minimum wage." *Kulzer Roofing v. Com. Dept. of Labor and Industry,* 459 A.2d 259, 261 (Pa. Cmwlth. Ct. 1982), *citing, Pennsylvania Prevailing Wage Appeals Bd. v. Steve Black, Inc.,* 27 Pa. Cmwlth. Ct. 21, 365 A.2d 685 (1976). In making a determination of the prevailing minimum wage, the "employer and employe contributions for employe benefits pursuant to a bona fide collective bargaining agreement shall be considered an integral part of the wage rate." 43 P.S.A. § 165-7. To accomplish this, the Act requires the Secretary set a prevailing wage that consists of a cash component and may include a benefits component.

This Court has recognized that Congress never intended ERISA to infringe on traditional areas of state control such as health and welfare. The state regulation of wages is one of those "areas of traditional state regulation that . . . Congress did not intend to preempt." *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 740 (1985). Similarly, the establishment of minimum labor standards is a traditional police power generally left to the states. *Fort Halifax Packing Co, Inc. v. Coyne,* 482 U.S. 1, 21 (1987).

II. THE THIRD CIRCUIT'S DECISION UPHOLDING THE PENNSYLVANIA PREVAILING WAGE ACT FOLLOWS SUPREME COURT PRECEDENT

The Third Circuit's decision upholding the Act conforms with the rulings of the Supreme Court. ERISA's preemption section — § 514(a) — promotes uniform regulations of employee benefits plans by preempting "any and all State law insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1114(a) (emphasis added). This Court has interpreted "relate to" to mean

having a "connection with", or "reference to", ERISA-covered plans, and the Court has cautioned that some state actions may affect employee benefit plans in "too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97, 100 n.21 (1983). *See also, District of Columbia v. Greater Washington Bd. of Trade*, ___ U.S. ___, 113 S.Ct. 580, 583 n.1 (1992). The Act has just such a "remote" and "peripheral" relationship to ERISA.

The Petitioner concedes that the Act and regulations do not bear any direct relationship to ERISA plans. The Act does not "single out" ERISA plans for special treatment or even refer to such plans. *United Wire, Etc. v. Morristown Memorial Hosp.*, 995 F.2d 1179, 1192 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 382, 126, L.Ed.2d 332 (1993). Rather, the Petitioner incorrectly argues that the Act is preempted by virtue of its indirect relation to ERISA. Although a state law's indirect relation to ERISA can be grounds for preemption, the Act bears no such relationship.

The Act's relationship to ERISA is most analogous to the New York disability benefits law upheld by this Court in *Shaw, supra.* Although disability benefits are exempt from ERISA, the New York law allowed employers to include these benefit obligations in multibenefit ERISA plans which were subject to ERISA preemption. Even so, this Court held that the New York law was not preempted because, even though the State was prohibited from forcing an employer to alter its ERISA plan, it could "force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." *Shaw, supra,* at 108 (emphasis added). Thus, if New York was dissatisfied with the disability benefits included in an employer's ERISA plan, it could avoid ERISA preemption by forcing the employer to maintain a separate disability benefits plan.

The Act, like the New York law, refrains from placing any requirements on ERISA benefits and only requires that an employer fulfill a wage obligation and not a benefits obligation. Just as the New York law can be fulfilled by maintaining a separate disability plan, the Act can be fulfilled using non-

ERISA benefit contributions or cash wages. As the Third Circuit noted, "[l]ike the New York law in *Shaw,* the Prevailing Wage Act is not preempted because an employer may comply without making any adjustment in its ERISA plans." *Keystone,* 37 F.3d at 961. *See also, Mackey v. Lanier Collection Agency & Service Co.,* 486 U.S. 825, 830-841 (1982) (approving garnishment law that would apply to ERISA plan benefits as well as other assets of debtors).

The state statutes and regulations that this Court has found preempted by ERISA are distinguished from the Pennsylvania law in that they directly or indirectly require compliance with ERISA benefits. In *District of Columbia v. Greater Washington Bd. of Trade,* ___ U.S. ___, 113 S.Ct. 580 (1992) (*"Greater Washington"*), a District of Columbia worker compensation law was held preempted by ERISA because it required employers who provided health insurance for their employees to provide equivalent workers' compensation. The District could only determine an employer's workers compensation benefit obligation by reference to that employer's obligations under its ERISA plan. Therefore, the required health insurance was held preempted because it was a welfare benefit plan regulated by ERISA. *Greater Washington, supra,* at 583.

The Act is clearly distinct from the worker compensation law in *Greater Washington* in that it does not regulate a plan covered under ERISA. Whereas the District's law was predicated on the existence of ERISA plans, the Pennsylvania law is only predicated on the existence of a prevailing wage. Under the Act, the Pennsylvania Secretary of Labor and Industry could measure a locality's prevailing benefits contributions even if all of the contributions were non-ERISA benefits. Similarly, a public works contractor could satisfy the benefits component of a given prevailing wage by only making non-ERISA benefit contributions, or by paying the equivalent in cash. As the Third Circuit noted, "[i]n the absence of ERISA plans, the Prevailing Wage Act could be meaningfully applied." *Keystone,* 37 F.3d at 957.

III. THE THIRD CIRCUIT'S DECISION UPHOLDING THE PENNSYLVANIA PREVAILING WAGE ACT IS CONSISTENT WITH OTHER FEDERAL CIRCUIT COURT DECISIONS.

The Third Circuit decision and ERISA preemption analysis conforms with other federal Appellate Court decisions that have found other state laws "too tenuous, remote, or peripheral" to warrant ERISA preemption. A previous Third Circuit decision held that a New Jersey statutory scheme setting minimum hospital rates was not preempted despite its obvious economic impact on ERISA plans because the statute could be "meaningfully applied" in the absence of any ERISA plans. *United Wire, Etc. v. Morristown Memorial Hosp.*, 995 F.2d 1179 (3d Cir. 1993), *cert. denied,* 114 S.Ct. 382, 126 L.Ed. 332 (1993). In *Aetna Life Ins. Co. v. Borges,* 869 F.2d 142, 148 (2d Cir. 1989), *cert. denied,* 493 U.S. 811 (1989), the Second Circuit upheld escheat laws that affected ERISA plans because a law's "indirect impact alone is not sufficient". *See also, Rebaldo v. Cuomo,* 749 F.2d 133, 140 (2d. Cir. 1984), *cert. denied,* 472 U.S. 1008 (1985) (statute regulating hospital rates that affected ERISA plans' ability to negotiate rates held not preempted).

State laws that Circuit Courts have found ERISA preemption can be distinguished from the Act by their far greater affect on ERISA benefits. *Local Union 598 v. J.A. Jones Constr. Co.,* 846 F.2d 1213 (9th Cir. 1988), *aff'd,* 488 U.S. 881 (1988) (state prevailing wage statute requiring contributions to apprenticeship program, an ERISA plan, preempted by ERISA), *aff'd,* 488 U.S. 881 (1988); *Standard Oil Co. of California v. Agsalud,* 633 F.2d 760 (9th Cir. 1980), *aff'd,* 454 U.S. 801 (1981) (Hawaii law requiring comprehensive health benefits for all workers preempted by ERISA); *National Elevator Industry, Inc. v. Calhoun,* 957 F.2d 1555, 1561 (10th Cir. 1992), *cert. denied,* 113 S.Ct. 406, 121 L.Ed.2d 331 (1992) (Oklahoma law reducing the minimum wage for employees only in specified apprenticeship program, which was an ERISA plan, preempted by ERISA); *General Electric Co. v. New York State Dept. of Labor,* 891 F.2d 25 (2d Cir. 1989), *cert. denied,* 496 U.S. 912 (1990) (New York prevailing wage law requiring ben-

efit contributions in particular categories preempted by ERISA). Unlike these laws, the Pennsylvania Act neither favors nor restricts ERISA benefits.

Two lower court decisions have incorrectly interpreted both the ERISA preemption test applied by this Court and the Third Circuit *Keystone* decision. *See Associated Builders & Contractors, Saginaw Valley Area v. Perry,* No. 93-CV-10016-BC, 1994 WL 668241 (E.D.Mich.), 2 WH Cases 2d (BNA) 754 (*"Perry"*); *Associated Builders & Contractors v. Baca,* 769 F.Supp. 1537 (N.D. Cal. 1991)(*"Baca"*). In both cases, the District Courts held that their respective state prevailing wage laws were preempted by ERISA because the laws did not credit fringe benefits paid in excess of the fringe benefit component of the prevailing wage requirement. By limiting the amount of benefits that could be subtracted from the *per diem* wage calculations, these lower courts held that the laws 'related to' and regulated ERISA by discouraging payment of benefits at higher than prevailing levels. *Perry,* 1994 WL 668241, at *4, 2 Wage & Hour Cas. at 758; *Baca,* 769 F.Supp. at 1548. The Petitioner — presenting a similar argument in this — case misinterprets the legal standard necessary for ERISA preemption.

When Petitioner presented this position on appeal to the Third Circuit, that court observed the irony of this argument: the party objects to a state prevailing wage law on the grounds that is does not relate enough to employee benefits and benefit plans. Thus, Petitioner suggests that the level of required cash wages should be tied to the level of benefits, whereas the Act currently fixes a cash wage component independent of a benefits component. As the Third Circuit noted, "[a] state law does not dictate or restrict the choices of ERISA plans by having nothing to do with employee benefits." *Keystone*, 37 F.3d at 959.

In fact, the objection raised by the Petitioner and the Michigan District Court could be raised against a prevailing hourly cash wage law that did not even have any benefits component. "Such a law would create the same "disincentive" against awarding benefits," the Third Circuit stated in *Keystone,* "because employers would have to pay the wage no

matter what level of benefits they provided." *Id.* Like the benefits component, the minimum cash wage requirement imposes an additional cost on the Pennsylvania works contractor and could influence its choices regarding ERISA benefits contributions. However, any wage regulation could have this effect and such wage regulation is clearly not preempted by ERISA. *Massachusetts v. Morash,* 490 U.S. 107 (1989) (Massachusetts statute requiring employers to pay employees for all unused vacation time upon discharge not preempted because law was instance of wage regulation and did not relate to benefit plans); *Fort Halifax,* 482 U.S. at 3-4 (Maine statute requiring employers to give severance payment of one week's salary for every year an employee had worked in event of plant closing not preempted).[2]

The Third Circuit's decision in *Keystone* upholds a valid exercise of state wage regulation. In its ruling, the Third Circuit follows Supreme Court precedent and conforms with other Appellate Court decisions. This Court should not grant this Petition given the absence of any real conflict among the lower federal courts.

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2. Both the Petitioner and the Eastern District Court of Michigan missed this crucial distinction between the Pennsylvania and District of Columbia laws and, based on this misperception, incorrectly accused the Third Circuit of using a discredited two-step ERISA preemption analysis. Perry, 1994 WL 668241, at *5, 2 Wage & Hour Cas. at 757. Greater Washington held that if a state law mandates disability benefits that are covered under ERISA, the law is preempted. Contrary to the Eastern District's opinion, the Third Circuit used the same analysis. However, unlike the District's law, the Act does not mandate any benefits covered under ERISA and therefore, the Act is not preempted. There was no "second step" in the Third Circuit's analysis.

CONCLUSION

The Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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February 15, 1995